FOURTH DIVISION
December 12, 2013

No. 1-12-1747

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	Nos. 09 CR 4368
	)	09 CR 4369
	)	09 CR 4370
	)	
EMMANUEL CHAPMAN,	)	Honorable
	)	John Joseph Hynes,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Howse and Justice Epstein concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Summary dismissal of defendant's post-conviction petition affirmed where claim that defendant was not advised that he would have to serve a two-year term of mandatory supervised release was contradicted by the record; mittimus corrected for clarity; affirmed and mittimus corrected.

¶ 2 Defendant Emmanuel Chapman appeals from an order of the circuit court summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS

5/122-1 *et seq.* (West 2012). He contends that he presented a meritorious claim that the trial court violated his due process rights when it failed to advise him that a two-year term of mandatory supervised release would follow the prison sentences he agreed to as part of his plea bargain. We affirm.

¶ 3 The record shows that in February 2009, defendant was charged in three separate cases with residential burglary, aggravated discharge of a firearm, unlawful use of a weapon by a felon, and aggravated unlawful use of a weapon. The charges related to an incident which occurred on or about January 21, 2009 involving defendant and Anthony Redman, a co-defendant who was not part of defendant's plea proceedings or this appeal.

¶ 4 On December 14, 2009, defendant entered a negotiated plea of guilty. In exchange for three concurrent 15-year prison terms, defendant would plead guilty to two counts of residential burglary and one count of aggravated discharge of a firearm. Defendant confirmed his understanding of the contents of the plea agreement. After ascertaining defendant's understanding of the charges and that he was giving up various rights, the court admonished defendant as follows:

> "[E]ach one of these charges is a Class 1 felony, and as a Class 1 felony, the minimum sentence at least on the aggravated discharge of a firearm charge would be probation and the minimum sentence in the penitentiary on all of these would be 4 to 15 years in the penitentiary. Residential burglaries are not probationable. So your minimum sentence would be 4 to 15 years. That is under normal circumstances. If you qualify for what is known as an extended term period, you would get up to 30 years in the penitentiary. There will be two years mandatory supervised release when you

> get out of the penitentiary. You can receive up to $25,000 in fines. Do you understand the minimum and maximum penalties on these charges?"

Defendant responded that he understood. The court then heard the factual basis for the plea, accepted the plea, and sentenced defendant as follows:

> "It will be the sentence of this court that you are sentenced to 15 years in the Illinois Department of Corrections. You will be given credit for 327 days in custody, time served. There is $605 in mandatory fees and costs here. Your sentence will run concurrent with each other. It is 15 years on each one of these cases and the counts that I have read and they will be concurrent with each other. All remaining counts motion State nolle pros."

¶ 5 Defendant did not file any postplea motions.

¶ 6 On March 16, 2012, defendant filed the instant *pro se* post-conviction petition, asserting that the court failed to advise him that a two-year term of mandatory supervised release (MSR) would be added to his negotiated sentence. Defendant contended that the court's failure to admonish him as to the MSR term violated Illinois Supreme Court Rule 402(a) (eff. July 1, 1997). Further, because he must serve an additional two years of MSR, he was subjected to a more onerous sentence than he was promised and was denied the benefit of his bargain with the State. As relief, defendant asserted he was entitled to have his prison sentence reduced by the length of his MSR term or to have the MSR term eliminated from his sentence altogether. Attached to the petition was a transcript of the plea proceeding and a sworn affidavit, signed by defendant, that all claims raised in the petition were true and correct to the best of his knowledge and belief.

¶ 7 Defendant's petition was summarily dismissed on May 18, 2012. In its written order, the court found that defendant's claim that he was not advised of the MSR term was indisputably meritless because it was contradicted by the transcript of the plea proceeding.

¶ 8 In this court, defendant contends the trial court erred in summarily dismissing his petition because it stated a meritorious constitutional claim that the trial court violated defendant's due process rights and deprived him the benefit of his negotiated plea bargain when it failed to advise him that a two-year MSR term would be added to his agreed-upon term of imprisonment. Defendant asserts that the court did not mention MSR when confirming the terms of his plea or imposing the sentence, and only mentioned MSR in the context of theoretical penalties he could face if he qualified for extended-term sentencing. Because the court's admonition never linked MSR to the actual sentence defendant agreed to serve and was ultimately imposed, the admonition was deficient. Accordingly, defendant requests that we order specific performance of his plea agreement by reducing his concurrent 15-year sentences by two years or remanding his cause for second-stage post-conviction proceedings.

¶ 9 The Act provides a three-stage process for a defendant to challenge his conviction or sentence for violations of federal or state constitutional rights. 725 ILCS 5/122-1—122-7 (West 2012). Proceedings begin when a petition is filed in the court in which the conviction took place. 725 ILCS 5/122-1(b) (West 2012). At the first stage, the petition need only present the "gist" of a constitutional claim, which is a low threshold requiring only a limited amount of detail. *People v. Jones*, 211 Ill. 2d 140, 144 (2004). The petition is dismissed if the court determines it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012). A petition is frivolous and patently without merit only if it has no arguable basis in law or in fact, meaning that it is based on an indisputably meritless legal theory or a fanciful factual allegation. *People v. Hodges*, 234 Ill. 2d 1, 11-12, 16 (2009). An indisputably meritless legal theory is one

completely contradicted by the record, and fanciful factual allegations include those which are fantastic or delusional. *Id*. at 16-17. We review the circuit court's dismissal of a post-conviction petition *de novo*. *People v. Edwards*, 197 Ill. 2d 239, 247 (2001).

¶ 10 Rule 402(a) lists the admonishments that the court must give to a defendant who is pleading guilty, including the minimum and maximum sentences prescribed by law. Ill. S. Ct. R. 402 (eff. July 1, 1997). Substantial compliance with Rule 402 is sufficient to establish due process. *People v. Whitfield*, 217 Ill. 2d 177, 195 (2005). A trial court violates due process and fails to substantially comply with Rule 402 when a defendant pleads guilty in exchange for a specific sentence and the trial court fails to advise the defendant, prior to accepting his plea, that a MSR term will be added to that sentence. *Id*. Where the trial court only mentions the MSR term during preplea admonishments, the First District has followed the *Whitfield* rule as applied in *People v. Marshall*, 381 Ill. App. 3d 724 (2008). *People v. Davis*, 403 Ill. App. 3d 461, 467 (2010). In *Marshall*, the court advised the defendant as follows:

> "You could be fined or you could get a penitentiary sentence and have to serve a period of three years['] mandatory supervised release, which is like parole, when you get out of the penitentiary."

Marshall, 381 Ill. App. 3d at 727. Although MSR was not mentioned at sentencing or in the written sentencing order, the admonition was sufficient because it advised the defendant of the MSR requirement before the court accepted the plea. *Id.* at 736.

¶ 11 The Illinois Supreme Court clarified the *Whitfield* rule in *People v. Morris*, 236 Ill. 2d 345 (2010), which stated that under *Whitfield*, a defendant must be advised that a term of MSR will be added to the actual sentence agreed upon in exchange for a guilty plea to the offense charged. *Morris*, 236 Ill. 2d at 367. However, the court also stated that "there is no precise formula" for admonishing a defendant of his MSR term, and an admonition must be read in a

practical and realistic sense. *Id.* at 366. Further, an admonition is sufficient if an ordinary person in the circumstances of the accused would understand it to convey the required warning. *Id.* Additionally, "*ideally*, an admonishment would explicitly link MSR to the sentence to which [the] defendant agreed in exchange for his guilty plea," would be given at the time the trial court reviewed the provisions of the plea agreement, and would be reiterated both at sentencing and in the written judgment. (Emphasis added.) *Id*. at 367. *Marshall* was cited as a case that discussed ideal admonishments. *Id*.

¶ 12 After *Morris*, the First District has continued to follow *Marshall*, noting that *Marshall* was cited with approval in *Morris*. *People v. Hunter,* 2011 IL App (1st) 093023, ¶ 19; *Davis*, 403 Ill. App. 3d at 467. Further, under *Whitfield*, a violation occurs only when there is absolutely no mention to a defendant, before he actually pleads guilty, that he must serve an MSR term in addition to the agreed-upon sentence that he will receive. *Davis*, 403 Ill. App. 3d at 466. If, prior to the admonishments, the defendant knows he will receive a prison sentence, and knowing this, is told during the plea hearing that he must serve an MSR term upon being sentenced to prison, then the defendant is placed on notice that his debt to society for the crime he admitted to having committed extends beyond his prison sentence. *Id*.

¶ 13 Defendant criticizes the First District's continued reliance on *Marshall*, contending that the defendant's conviction in *Marshall* was final three years before *Whitfield* was announced, and further, *Morris* did not cite *Marshall* to approve the substance of the admonition that was actually given. However, we decline to depart from precedent on this issue and will continue to rely on *Marshall* until the supreme court tells us differently. See *Hunter*, 2011 IL App (1st) at ¶ 19; *Davis*, 403 Ill. App. 3d at 467.

¶ 14 Here, applying our precedents, the trial court's admonition was sufficient. Prior to accepting defendant's plea, the trial court stated, "[t]here will be two years mandatory supervised

release when you get out of the penitentiary." The court gave this admonition when describing the range of possible sentences for defendant's sentences, including non-extended and extended-term sentences and fines. The MSR requirement stands out as a certainty in contrast to the surrounding admonitions, which included that defendant could receive an extended-term sentence "[i]f you qualify," and that defendant "can receive" up to $25,000 in fines. Further, at the beginning of the plea proceeding, defendant confirmed that prison terms were part of his agreement. When the trial court then admonished him that there would be two years of MSR "when you get out of the penitentiary," defendant was informed that MSR was part of his sentence. Considering the context and the exact language used, we find that the court substantially complied with Rule 402 and comported with due process because it advised defendant of his MSR requirement before accepting his plea. Additionally, we note that this admonition was similar to others found sufficient in the First District. See *Hunter*, 2011 IL App (1st) 093023, ¶ 13 (admonition sufficient where judge advised that "[a]ny period of incarceration would be followed by a period of mandatory supervised release of two years following your discharge from the Department of Corrections"); *Davis*, 403 Ill. App. 3d at 462, 465 (given in context of describing sentencing range, admonition that "[y]ou would have to serve at least three years mandatory supervised release, which is like parole," made clear that MSR term was mandatory). Defendant's claim is contradicted by the record and therefore indisputably meritless.

¶ 15 Defendant urges this court to follow the Second District's decision in *People v. Burns*, 405 Ill. App. 3d 40 (2010), and the Fifth District's decision in *People v. Company*, 376 Ill. App. 3d 846 (2007). In *Burns*, the admonition that, "[t]here's a potential fine of up to $25,000, with a period of three years mandatory supervised release" was found insufficient because it did not link the term of MSR to the actual sentences that the defendant would receive under his plea

agreement and did not convey unconditionally that MSR would be added to the agreed-upon sentences. *Burns*, 405 Ill. App. 3d at 42-43. In *Company*, an admonition that stated the defendant would be subject to an MSR term if convicted at trial was found insufficient because the MSR term was phrased as a contingency. *Company*, 376 Ill. App. 3d at 850-51. Unlike the admonitions in *Burns* and *Company*, here the court's admonition was stated unequivocally and as a certainty.

¶ 16 More generally, in urging this court to follow *Burns*, defendant argues for an application of the *Whitfield* rule that is not required and has not been followed by the First District. Even in *Morris*, the court stated that *ideally*, the trial court's admonition would explicitly link MSR to the sentence to which the defendant agreed. *Morris*, 236 Ill. 2d at 367. Although the better practice would be to incorporate the MSR admonition when the specific sentence is announced, this is not mandatory. *Hunter*, 2011 IL App (1st) 093023 at ¶ 14, 19 (citing *Morris*, 236 Ill. 2d at 368). A trial court complies with Rule 402 and satisfies the requirements of due process by advising the defendant prior to imposing the sentence that he will have to serve a term of MSR. *Id*. at ¶ 19.

¶ 17 Next, the State requests that we amend defendant's mittimus to reflect two convictions for residential burglary and one conviction for aggravated discharge of a firearm, and to reflect that defendant was sentenced to three concurrent terms of 15 years' imprisonment. Defendant responds that we need not amend the mittimus because it already addresses defendant's three convictions and concurrent sentences.

¶ 18 The record contains two mittimuses. The first mittimus lists one conviction for residential burglary with a 15-year sentence, and states that the sentence is concurrent with the sentence imposed in two other cases. The second mittimus lists one conviction for aggravated discharge of a firearm with a 15-year sentence, and also states that the sentence is concurrent

with the sentence imposed in two other cases. Neither mittimus explicitly contains defendant's second conviction for residential burglary. In the interest of clarity, we correct defendant's mittimus so that it reflects two convictions for residential burglary and one conviction for aggravated discharge of a firearm, with three concurrent 15-year prison sentences—one for each conviction. See Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999).

¶ 19 For the foregoing reasons, we affirm the judgment of the circuit court and order the mittimus corrected.

¶ 20 Affirmed; mittimus corrected.